INDIGENT DEFENSE IN MONTANA

For the record, my name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana.

I am honored to have been asked to provide some background for the benefit of people who are new to the commission. I have been actively engaged on this front for over a decade, but so have a number of others in the room including members of the staff and members of the Commission. Mine is but one perspective, a perspective shaped by litigation which eventually morphed into advocacy and lobbying.

To understand how we got where we are today regarding indigent defense in Montana, and with the hopes of offering some level of objectivity, I have asked Commission staff to make available to everyone who is interested three documents that come from the public record in the case:

1. An Expert Report: An Assessment of Indigent Defense Services in Montana, submitted in the case *White v. Martz* CDV-20020133, August 4, 2004, by the National legal Aid and Defender Association (NLADA);

2. The Stipulation and Order of Postponement of Trial, May 7, 2004, agreed upon by the counsel in the case and signed by the Honorable Thomas C. Honzel, Montana State District Court Judge;

3. The Final Motion to Dismiss submitted August 20, 2005

My intention is to walk you through some of the more significant landmarks that have dotted the legal landscape on this remarkable journey thus far, with the hope that it will help put into perspective the significance of how we go forward from here. [Editor's note: To be clear, much of what follows is taken verbatim from the previously mentioned documents and are not footnoted as such].

Inadequate indigent defense has been an issue ever since I started with the ACLU in August of 1988. In fact, we could start this discussion going back 35 years when the NLADA received a grant from the federal Law Enforcement Assistance Association (LEAA) to provide technical assistance to state indigent defense systems.

1974: LEAA established the National Center for Defense Management (NCDM) whose mission was "to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training".

1975: The Montana Legal Services Corporation Board of Trustees urged the Montana Board of Crime Control to request a technical assistance grant from NCDM to interview

representatives of various Montana organizations and agencies, soliciting their views concerning indigent defense services in the state. They focused their analysis on three jurisdictions- Yellowstone County, Flathead County, and the 16th Judicial District (Fallon, Powder River, Carter, Custer, Rosebud, Prairie and Garfield counties.

1**976**: NCDM issued their report ***Montana Statewide Defender Systems Development Study*** finding that the failure of practitioners to adhere to prevailing criminal justice standards was not simply an "occasional omission" or "isolated defect", but the result of a "substandard system of indigent criminal justice."

Feb 14, 2002: The American Civil Liberties Union (ACLU) filed a class action lawsuit against the State of Montana alleging constitutional deficiencies in the delivery of the right to counsel. (*White v. Martz*). In addition to Governor Martz, Defendants included the Supreme Court Administrator; Appellate Defender Commissioners (5); District Court Council Members (5); County Commissioners from Missoula, Butte-Silver Bow, Flathead, Glacier, Lake, Ravalli and Teton Counties.

We had a superlative team assembled to represent the class plaintiffs. Ron Waterman, of Gough Shanahan, Johnson and Waterman served as lead cooperating attorney. National ACLU attorneys Robin Dahlberg and Vince Warren were joined by Julie North of the law firm of Cravath, Swaine and Moore. The unsung heroine in the case was our staff attorney Beth Brenneman, who tirelessly labored to ensure the certification of the class.

We joked amongst ourselves that we'd become the most successful criminal defense firm in the state. Counties were scrambling to offer deals or early release to people they'd previously ignored once they'd been identified as potential members of the class.

Defendants moved to have the suit dismissed. Their motions were denied in their entirety by the Court on July 24, 2002.

An order granting class certification of all indigent persons who had or would have cases pending in the courts of those counties and who relied on those counties and the relevant county commissioners to provide them with defense counsel as of the date of the order that was signed on June 26, 2002.

Plaintiffs conducted extensive discovery, including taking the depositions of over eighty witnesses, including then current and former public defenders from each of the seven counties at issue, various state and county officials, and members of the Appellate Defender Commission.

2003: The legislature made an attempt to address some of the issues raised by the complaint in senate legislation carried by Sen. Jon Esp that amounted to "too little, too late" for anything to come from it. The Interim Law and Justice Committee however was assigned, as their highest priority over the interim, to address the issue of indigent defense.

Rep. Mike Lange chaired that subcommittee. Harry Freebourn served as the legislative counsel staff person for the committee.

A pre-trial scheduling order was signed by the Court on December 12, 2003. A trial date of May 17, 2004 was set and plaintiffs and defendants provided each other with expert witness disclosures, intended trial exhibits and deposition designations in accordance with the pre-trial scheduling order.

2004: At the March meeting of Interim Law and Justice Committee, held in Livingston in close proximity of the Montana Association of Criminal Defense Attorneys, Mike Sherwood persuasively articulated to the committee members differences between what any of them might expect for their own criminal defense trail depending on whether they hired private counsel versus depending on a run of the mill public defender. I think that presentation, as much as any single act, helped educate legislators that there ought not be two tiers of justice- one for people of means, and one for people without.

It is my recollection that we were approached at that time about entering into some sort of settlement arrangement with the State of Montana.

Because the parties agreed that a properly funded state-wide public defender system with sufficient administrative and financial resources is necessary to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation;

and that we understood that the Montana State Legislature must be included in the formulation of any systemic state-wide system remedy;

we entered into a stipulated agreement on **May 7, 2004** to hold the Action in abeyance to permit the Montana State legislature to pass legislation during its 2005 legislative session that adequately addresses the indigent defense system.

From the litigants' perspective our position at the time was this:

- Plaintiffs agreed to stay the trial even though we were ready to proceed on May 17 because a legislative solution is the best way to address the need for a fully integrated and funded indigent defense system in Montana.

- Our work on the case revealed a broken system in which public defenders worked with little or no supervision, received no training and had no access to resources even remotely comparable to their prosecutorial counterparts.

- Our clients were and are paying for the failures of the system with, among other things, longer than necessary time served in jail and public defenders who did not and could not keep up with their cases. We had, for example, clients who spent more time in jail prior to trial than the maximum permissible sentence for the charges they faced and public defenders fresh out of law school thrown into what one called "the baptism of fire."

- We're pleased that in exchange for our agreement to stay the trial, the Attorney General's Office has decided to work with us rather than against us by advocating for a constitutionally adequate public defender system in Montana. We are hopeful that their efforts will be fruitful and believe that their perspective will be helpful to the legislature.

- The Attorney General's Office has agreed to advocate for a system that includes an oversight commission that will issue statewide standards for all public defenders, a chief public defender responsible for overseeing the day-to-day administration of the system, and fully staffed regional public defender offices in those counties with full time prosecutors. That office will also advocate for this system to be fully and adequately funded, in contrast to the current, woefully underfunded, system.

- We believe the legislature of Montana will do what's right and craft a Montanan solution to a Montanan problem. Given the severity of the problem, we are hopeful that the legislature will recognize that a band-aid will not be enough — a proper solution will need to incorporate a full-scale overhaul of the current system that brings it into compliance with the Constitution and Montana state law.

- We understand that the legislature is already on the path towards creating such a solution — the Interim Committee on Law & Justice has held __ meetings thus far to discuss the issue and has another meeting scheduled at the end of May.

- We are hopeful that no further litigation will be necessary. However, should the legislature fail to pass or fund appropriately an adequate system, we are fully prepared to bring the case back to court on May 31, 2005, or earlier if necessary. Our discovery is nearly completed and we will not let this stay on the case lull us into complacency to the detriment of our clients.

CHRONOLOGY OF SB 146

July 21, 2004: Interim Law and Justice Committee submitted a bill draft request with Senator Dan McGee as the primary sponsor.

2005: The legislature took on creating a public defender system in SB 146. Senators Dan McGee and Mike Wheat took the bi-partisan lead. The bill passed the Senate with unanimous support. It garnered 89 votes in the House.

Mike WheatChair Brent R CromleyMember Aubyn CurtissMember Jon EllingsonMember Jesse LaslovichMember Jeff ManganMember Gary L PerryMember Lynda MossMember Jerry O'NeilMember Gerald PeaseMember Jim ShockleyMember Valencia LaneLegislative Branch Staffer Senate Secretary ReservedSecretary Dan McGeeMember

John MacMasterLegislative Branch Staffer Paul ClarkVice Chair Arlene BeckerMember Robyn DriscollMember George EverettMember Gail GutscheMember Christopher HarrisMember Roger KoopmanMember Michael LangeMember Tom McGillvrayMember Mark E NoennigMember Art NoonanMember John ParkerMember Jon SonjuMember John

Ward Member Bill Wilson Member Jeanne Windham Member Diane Rice Chair Ron Stoker Vice Chair House Secretary Reserved Secretary

Free Conference Committee: Reps. Rice, Lange, Parker, and Gutsche appointed

Senators Wheat, Ellingson, and McGee

January 18, 2005: First hearing in Senate Judiciary

February 14, 2005: Committee Executive Action 12-0 passed as amended.

Feb 19- passed on voice vote 50 to 0, rereferred to finance & claims

March 8 Hearing F&C

March 18 passed 17 to 2 F&C

March 22- 50 to 0 2nd reading voice vote

March 23 passed 3rd reading 48 to 0

March 31 House Judiciary hearing

April 1- exec action concurred as amended

Ap 7 2nd reading concurred 88 to 12

April 8 3rd reading concurred 87 to 10

April 9 2nd reading house amendments not concurred on voice vote 50 to 0

April 11 Free Conference Committee appointed

April 13 Senate Hearing/ free conference committee report received

April 16 3rd reading free conference committee report adopted 50-0; 89-11

April 28 Signed by Governor

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